

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

JUN 27 1945

PAUL P. O'BRIEN,
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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 17-18) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant after a jury trial, of violation of the Jones-Miller Act (21 U.S.C. 174). The indictment alleged in the first count that the defendant and two co-defendants, on or about the 12th day of August, 1944, did conceal and facilitate the concealment of narcotics, to-wit, opium, and in the second count that on or about the 13th day of August, 1944, they did facilitate the transportation of the same opium (Tr. 2-3).

The Court below had jurisdiction under the provisions of Title 28, United States Code, Section 41,

subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 United States Code, Section 225, subdivisions (a) and (d).

STATEMENT OF THE CASE.

Appellant's statement of the case is given in a light most favorable to himself and does not present to the Court an adequate picture of the facts upon which the conviction is based. Therefore, we make the statement which follows.

STATEMENT OF FACTS.

Benedict Pocaroba, a Federal Narcotics Agent for sixteen years, arrived in Santa Cruz, California, pursuant to orders from his superiors in the Federal Bureau of Narcotics on May 1, 1944. Upon his arrival he was met by other Federal Narcotics Agents and registered at a hotel under the assumed name of Benedict Vicari.

He first met the appellant, Salvatore Maugeri, known to him and to his intimates in the town as Sam Maugeri, on May 7, 1944 at the latter's concession on the Boardwalk in Santa Cruz. This concession was usually open for business from 9:00 o'clock in the morning until 1:00 o'clock the following morning and was usually attended by the appellant.

Pocaroba saw the appellant many times after this first meeting and became quite friendly with him. On

May 15, 1944 at the invitation of the appellant, he visited his home at 32 Main Street and met his wife and family. Thereafter, he visited at Maugeri's home on an average of at least twice a week.

On May 22, 1944 Pocoroba moved from his hotel to Miller's Apartments on Beach Street, where he occupied a cabin which was located a couple of blocks from the appellant's concession.

He accompanied the appellant on several trips to San Francisco by automobile, the first occasion being on June 5, 1944.

On June 6, 1944 Pocoroba, after having had dinner at the appellant's home, drove with him in one of the latter's automobiles to his concession. At this time they had a conversation about narcotics, the subject of narcotics being mentioned first by Maugeri. The Agent told Maugeri that he was not personally interested but that he had some friends in Chicago who might be. Maugeri asked him what heroin sold for in the East and whether a can of opium would make an ounce of heroin (Tr. 27).

The next day the Agent saw the appellant at his concession and the latter said, "Why don't you write to your friends which you have in Chicago and see if we can make a connection" (Tr. 27-28). Pocoroba promised to do so and later told the appellant that he had written the letter.

On June 15, 1944 the appellant came to the Agent's cabin and Pocoroba showed him a letter which he stated he had received from Chicago concerning nar-

cotics. According to the letter the men in Chicago were willing to pay \$150 or \$160 a can for opium. Maugeri said the best price he would sell for would be \$225 to \$250 a can in 50-can lots. In a previous conversation with the Agent, Maugeri said he would furnish "mud" which is the underworld term for opium (Tr. 28).

On July 6, 1944 Pocoroba met a man by the name of Joe Tocco at Maugeri's house. This man was introduced to the Agent as "Joe from San Diego" and Pocoroba was introduced as Mr. Vicari. This meeting took place in the morning and the witness testified that it appeared that Tocco had spent the night in Maugeri's home. The Agent met Tocco several times after this at Maugeri's home where Tocco was stopping (Tr. 28).

On July 8, 1944 the Agent met the appellant's son, who was home from the Navy on furlough. At that time the appellant introduced "Joe" to his son as Joe Tocco. On one occasion the Agent accompanied Tocco and Maugeri to San Francisco in an automobile which the appellant had purchased for his son (Tr. 29).

On July 21, 1944 Pocoroba was introduced by Tocco to Joe Barri on the Boardwalk; he was introduced as Mr. Vicari. He again saw Barri that evening at the appellant's home, at which time the appellant and Tocco were among the persons present (Tr. 29-30).

On July 26, 1944 Tocco and Barri rented a cabin near Felton in the Santa Cruz Mountains where they remained until August 6, 1944 (Tr. 30).

Agent Pocoroba has a son who is a pilot in the Army Air Forces.

Early in August the Agent had a conversation with Maugeri about his son operating an airplane. The appellant asked Pocoroba if his son could fly out of the country. The Agent said he didn't know but would find out. The next day Pocoroba told Maugeri that he had spoken to his son over the telephone and that his son would be allowed to fly to Canada and to Mexico. Maugeri stated that it would be a good chance for him to fly his plane to Mexico and get a load of opium and bring it into this country (Tr. 30).

On August 8, 1944 Pocoroba had dinner at the appellant's home at which time Tocco and Barri were present. After dinner these three went to the Agent's cabin.

The next day, August 9, Maugeri drove Tocco and Barri to San Francisco in his car.

On August 10, 1944 Pocoroba met Maugeri at his concession at about 9:00 o'clock in the evening. Maugeri asked him if either Tocco or Barri returned to Santa Cruz could be accommodate them in his cabin. He said that he could (Tr. 32).

When Pocoroba returned to his cabin that evening, Barri was already there.

On August 10, 1944 at about 11:00 in the evening, Maugeri came to Pocoroba's cabin; Joe Barri was there at the time.

The witness testified (Tr. 33):

“At that time Joe Barri told Sam Maugeri that he had been followed while in San Francisco, and he said, ‘That is not the proper thing to do, to take me to a strange city, put me on a hot spot and let the police look me over’. Sam Maugeri answered that he was crazy, that he did not know what he was talking about, that he had taken him among friends, and that nobody had followed him. Joe Barri then told Maugeri—he said, ‘Listen, I am from New York, and I know when I am being followed. You don’t have to tell me.’ He said, ‘Furthermore, what good did it do bringing the grips into your friend’s house when he wouldn’t give me permission to load the stuff?’ Maugeri replied that he had been in too much of a hurry, that he was nervous and excited, that there would have been other ways of loading the stuff. Maugeri then said, ‘I had the man bring the stuff in San Francisco, and from San Francisco he has to bring it here’. Barri told him, he said, ‘Well, we don’t do business like this in New York. Whenever we have a stranger in New York for business purposes we always look after his safety’. Maugeri then left the cabin, and Barri remained all night with me.”

Pocoroba did not see Tocco on that evening but saw him the next evening, August 11, 1944, when Tocco came to his cabin with a brown leather suitcase, a black Gladstone and a blue canvas hand bag (Tr. 34).

Tocco came to the cabin about 9:00 o’clock that evening. Barri was already there and they slept in the cabin that night. On the following morning, Saturday, August 12, 1944, Maugeri came to the cabin

shortly after 9:00 o'clock. The witness testified (Tr. 34-35):

“A conversation took place, at which Maugeri, Tocco, Barri and myself were present. At that time Maugeri told Barri, ‘The man is here again and I have already given him the money. Now, it is entirely up to you. You take the stuff or they will dump it in the ditch.’ At that time Barri said, ‘I don’t know how you people do business in California’. He said ‘Where do you expect me to pack this stuff, in the street? Your friend in San Francisco won’t give me permission to pack it in his house; you won’t give me permission to pack it in your house. What am I to do?’ Maugeri then got up and said ‘I am going to work. Think it over and let me know.’ Maugeri then left the cabin shortly after 9:00 o'clock on that morning. About 5:00 o'clock in the afternoon of that same day Joe Tocco was in my cabin, and he asked me for permission to pack the opium in my place. I agreed. Tocco then left the cabin, and returned in about ten or fifteen minutes. Barri was in the cabin with me at the time Tocco returned. The cabin consists of a combination living and bedroom, a kitchen and a bathroom. In the combination living and bedroom were two beds, a double bed and a single bed. On the previous night Tocco and Barri had occupied the double bed and I had occupied the single bed. After 11:00 o'clock on Saturday evening, August 12th, Joe Tocco and Joe Barri and myself being present, Maugeri came into the cabin carrying a pasteboard box covered by newspaper. He gave it to Tocco, who put it on the floor. Maugeri then went away and came back a few minutes later with another box about the

same size, also wrapped in newspaper, and Tocco received it. I then mixed a drink and gave it to Sam Maugeri. He drank it in a hurry and went away. Maugeri had no conversation with Tocco or Barri at this time and place. When Maugeri left he said to Tocco, 'I will pick you up at 5:00 o'clock'."

After Maugeri left, Tocco took the tan suitcase (Gov't's. Ex. 1 for Identification) from under the bed, opened it and took out some brown colored wrapping paper and some paper tape. He also produced a small scale and Barri weighed each can of opium while Tocco marked down the weight. They wrapped the cans of opium into bundles with the brown wrapping paper and tied them with gummed paper tape and then put the bundles in the brown leather bag and the blue overnight bag. They finished weighing the cans around 1:00 o'clock Sunday morning, August 13th. Pocoroba stated that the cans which they wrapped were the ordinary 5-tael cans in which opium is usually packed (Tr. 37).

Pocoroba retired about 1:00 o'clock and Barri and Tocco at 2:00 o'clock. At about 3:30 o'clock someone rapped on the door.

The witness testified (Tr. 38):

"At about 3:30 somebody rapped at the door and Joe Tocco went to the door and opened it, and Sam Maugeri said, 'Let's get the grips and let's go'. Tocco was dressed; he hadn't undressed for the night, but he had taken his shoes off. Tocco then took the brown leather suitcase, Government's Exhibit 1 for Identification, and the

blue overnight bag, Government's Exhibit 2 for Identification, and left the cabin. Barri and I remained in the cabin."

The witness then identified Government's Exhibits 3 and 4 in evidence, two cardboard boxes as the two boxes brought into his cottage by Sam Maugeri with the opium on the night of August 12, 1944, stating that he had put identifying marks on the boxes (Tr. 38).

Pocoroba and Barri arose at about 8:30 o'clock in the morning and later took a taxi to the bus station. Pocoroba left Barri there at about 11:00 o'clock on that Sunday morning and has not seen him since (Tr. 38).

Upon leaving Barri, Pocoroba endeavored to contact some of his fellow officers in Santa Cruz by telephone but was unsuccessful. He saw and conversed with Maugeri at about 11:30 o'clock that morning. He later met Agent Newman and other Agents and reported what had happened. He later went to the Oakland Mole in an effort to find Tocco on a train leaving for the East but did not find him. He left San Francisco for Santa Cruz, arriving there between 1:00 o'clock and 2:00 o'clock in the morning of August 14, 1944. He went to his cabin where he found several fellow officers awaiting him and delivered the two cardboard boxes with the traces of opium in them, the brown wrapping paper and the brown gummed paper tape (Government's Exhibits 3, 4, 5 and 6) to Agent McGuire (Tr. 39). He stated that the paper and the tape had been left in his cabin

by Tocco and Barri after they had used the portion they needed to wrap the cans of opium (Tr. 40).

On Wednesday afternoon August 16, 1944, Pocaroba returned to Santa Cruz where he met Maugeri at his concession about 4:00 o'clock in the afternoon and had a conversation with him.

The witness testified (Tr. 42):

“I asked if he heard from the boys, and he said, ‘No’ and he said ‘If I don’t hear from them again I would be glad. They are certainly lousy, Joe Tocco was introduced to me by a friend of mine and the others were lousy’. And I asked him where he took Joe Tocco and he said to Berkeley.”

The witness’s story was unshaken on cross-examination and he reiterated that it was Maugeri who first mentioned the subject of narcotics in their conversations. The witness stated (Tr. 48):

“It was on the 6th of June, 1944, that Maugeri started talking to me about narcotics, which was about a month after I had first met Maugeri. The subject started when Maugeri said he had been convicted for counterfeiting in 1935 and that the counterfeiting racket was lousy, the only ones that made money are the ones that print the money. He said he would sooner deal in narcotics than in counterfeit money. At that time our files showed Maugeri’s criminal record, and I had known of Maugeri’s record before he told me. Maugeri was the first one to mention narcotics, and I don’t know what brought it about; it was just daily association, as naturally you do when

two oldtimers get together, and as I thought it was my duty to talk about rackets while here working on this Maugeri case.”

He further testified (Tr. 53):

“On the night of August 9th, when I got to my cottage and found Barri there, Barri was so nervous he was not able to go out, he was afraid to go out the door, so he asked me to go to Sam Maugeri to get in touch with somebody in San Francisco to see that Tocco got safely back to Santa Cruz. Maugeri gave me a telephone number to call, which was a saloon at 1371 Grant Avenue. Maugeri was too busy working at the concession at the time and did not have an opportunity to phone, himself. The reason that Mr. Barri wanted to phone to Tocco in San Francisco was to tell him to bring the suitcases back.”

On redirect examination the witness corrected himself and gave the correct date of this incident as August 10th and not August 9th as he had stated on cross-examination.

The witness repeated his testimony that Maugeri brought the cardboard cartons into the cabin (Tr. 55) and that the cans of opium which Tocco and Barri wrapped and placed in the luggage, came from these cartons (Tr. 59). He also testified that the cartons contained traces of opium which had leaked from the cans and that these traces were still in the cartons at the time they were offered in evidence at the trial (Tr. 59-61).

On cross-examination in answer to questions by appellant's counsel, he also stated that Barri came to

Santa Cruz with \$22,000 which he gave to Maugeri for the purchase of the opium. (Tr. 61).

On redirect examination Agent Pocoroba related the following conversation had with Maugeri on August 16th (Tr. 73):

“I told him I was going home and I would like to take ten cans of opium with me, and Maugeri said, ‘It is not my policy to do that kind of a business, but I will do it for you, but it will take about a week before I can get it.’”

Pocoroba also testified on redirect examination that on the night of August 10, 1944, in his cabin, Barri told him that he had given Sam Maugeri \$22,000 in \$1000 and \$500 bills for the purchase of 105 cans of opium, and that he had been followed by detectives in San Francisco and had no intention of doing any business (Tr. 74).

He further testified that on the same night, August 10, 1944, Barri told him to go to Maugeri's concession and tell Maugeri to call somebody in San Francisco and see that Tocco got safely in Santa Cruz and to his place. He went to Maugeri, related the message, and Maugeri gave him a number which was the number of a saloon on 1371 Grant Avenue, conducted by a man named Pete Scambellone; that he, Pocoroba, telephoned this saloon, that Tocco was not there and that he left a message for him to come to his cabin as soon as he got back (Tr. 75-76).

He further testified that Tocco and Barri obtained the cans of opium that they put in the suitcases from

the two boxes that Sam Maugeri delivered to the cabin (Tr. 76).

He repeated his testimony given on direct examination that on the evening of August 12, 1944, when Maugeri was leaving the cabin, after having deposited the two cardboard boxes there, he told Tocco he would return at about 5:00 o'clock in the morning. That when, at about 3:30 o'clock the following morning a knock sounded on the door and a man's voice said "Get the grips and let's go", "it sounded like Maugeri's voice." "I recognized it as Maugeri's voice" (Tr. 77). "There wasn't any doubt in my mind that it was Maugeri's voice" (Tr. 80).

On recross examination the witness testified that he had a conversation with Maugeri in which he asked him to get him ten cans of opium to which Maugeri replied that it was not his policy to deal in small amounts, but that he would do it for him for a price of \$225 a can (Tr. 78).

Peter Scambellone (Tr. 81-83), testifying for the Government, stated that about Wednesday, August 9, 1944, Salvatore Maugeri called at his saloon at 1371 Grant Avenue and asked permission to leave two suitcases, belonging to a friend, in his home. He gave him the key and a taxi driver picked up the suitcases and took them to his home. He claimed he did not see the suitcases in his home and could not identify Government's Exhibits 1 and 2 for Identification, although he stated that one of the pieces of baggage was "... a big bag like that", identifying Government's Exhibit

1 for Identification. He thought the baggage remained in his home a couple of days and didn't remember when they were taken out. He claimed that neither Maugeri nor Tocco went to his house that day; that Tocco did not phone him at his home as he had no telephone there and that the keys to his home were returned to him about five minutes after they had been received by the same taxi driver.

He contradicted himself in one instance, first saying that Tocco and Barri were present in the saloon with Maugeri but later denied that he knew them (Tr. 82-83).

John Saccocci (Tr. 84-85), testifying for the Government, stated that he was a taxi-driver by occupation and that he had known the appellant for sixteen or eighteen years. That on a day, the exact date of which he could not remember, he met Maugeri in Scambellone's saloon and, at the appellant's request, took some suitcases to Scambellone's home. He removed the suitcases from appellant's automobile and took them to Scambellone's home, the key to which had been given him by Maugeri. The suitcase and bag were light and appeared to him to be empty.

Burhl B. Harwood (Tr. 85-86), testifying for the Government, testified that he was a clerk in the Bowman-Forgey Stationery Company in Santa Cruz. That on August 8, 1944, he sold a considerable amount of brown wrapping paper and gummed paper tape to two men, whom he described. He stated that Government's Exhibits Nos. 5 and 6 in evidence appeared

to be a portion of the brown wrapping paper and gummed paper tape which he sold on that occasion. That he did not make more than one sale of that wrapping paper on that day.

Henry B. Hayes (Tr. 86-97), testifying for the Government, testified that he has been a Federal Narcotics Agent since 1936. That on August 8, 1944, he followed Joseph Tocco and Joe Barri from the residence of Sam Maugeri to the Bowman-Forgey Stationery Store on Pacific Avenue in Santa Cruz. That Mr. Harwood, the clerk, told him they had purchased some brown wrapping paper and gummed tape and looked at a postal scale which they did not purchase.

He testified that before that time he had been engaged in the surveillance of Maugeri in Santa Cruz, together with other Federal Agents; that except for intervals of three or four days at a time he was in Santa Cruz continuously from March 2nd to about August 13, 1944. During this time he saw Pocoroba in the company of Maugeri on many occasions;—saw him enter Maugeri's home, meet him at his concession, travel in his automobile and attend theatres.

He also stated that he knew Joe Tocco and had seen him in the company of Pocoroba on more than one occasion; that Tocco was living at Maugeri's home and that he saw them together on several occasions. He also saw Barri in Maugeri's company on more than one occasion. He saw Maugeri visit the cabin of Tocco and Barri in Felton and on July 28th or 29th saw Maugeri drive them to his home in Santa Cruz

where they unloaded their baggage and took it into the house.

On August 9, 1944, the witness, accompanied by Customs Inspector Gleason, followed Maugeri's car to San Francisco. Maugeri was driving and Tocco and Barri were his passengers. They stopped on 24th Street and Maugeri entered a building. They then drove to Geary Street between Powell and Stockton Streets and Barri proceeded to Scambellone's saloon on Grant Avenue which they entered. He saw Tocco there later. He looked into Maugeri's parked car and saw a tan suitcase and black handbag therein. He saw Maugeri talking to a taxi driver and saw the latter remove the bags and take them to 1644 Grant Avenue where he brought them into a house.

At about 5:30 the witness and another Agent followed Maugeri in his automobile to the Bayshore Highway where he drove south. He later saw Tocco and Barri at Scambellone's saloon, then saw Tocco at the Telenews Theatre and still later at the Whitcomb Hotel. Barri was with him at the Whitcomb Hotel about midnight.

The next day, August 10, 1944, he followed Tocco from the Whitcomb Hotel to Scambellone's saloon. At about noon he again followed Tocco and Barri from the Whitcomb Hotel to the Greyhound Bus Station at Fifth and Mission Streets and then to the vicinity of Scambellone's saloon. Barri did not enter the saloon but stood on the street corner watching Tocco as he did so. Barri then walked rapidly to a

theatre which he entered, remaining about ten minutes. He emerged without his hat, walked to a street car which he boarded. Barri kept watching behind him and looking up and down the street. He appeared to have observed someone. He saw him later at the bus station at Fifth and Mission Streets where he boarded a bus around 5:20 o'clock. The witness became ill and did not participate in the investigation after August 10, 1944.

Jess Braly (Tr. 98-108), testifying for the Government, stated that he was a United States Customs Patrol Inspector. He arrived in Santa Cruz on May 5, 1944, and conducted a surveillance of Maugeri, Tocco, Barri and Pocoroba. He saw various members of this group together on many occasions. He corroborated Agent Hayes' testimony as to the activity of the defendants on the day of their trip to San Francisco on August 9, 1944, with the added particular that when Maugeri's car stopped on Geary Street he saw Tocco get out and he followed him to the Santa Fe ticket office where he remained for about twenty-five minutes. He corroborated Agent Pocoroba's testimony as to the particulars of finding the cardboard boxes, wrapping paper and tape in the cabin.

On redirect examination (in answer to a question designed to pursue a topic opened up on cross-examination) the witness testified that the reason he and the other Agents were not watching Pocoroba's cabin on the night of August 12th and the early morning of

August 13th—when Maugeri delivered the opium and later called for Tocco in his car—was because Poco-roba had told them that Barri was frightened and was afraid the law was following him and they did not wish to make him suspicious.

Emmet Gleason, Customs Patrol Inspector (Tr. 108-109), testifying for the Government, corroborated Agents Hayes' and Braly's testimony concerning the general surveillance of the defendants in Santa Cruz and in particular the circumstances of the trip to San Francisco on August 9th and the visit to Scambellone's saloon, and the moving of the grips from Maugeri's car to Scambellone's home.

Thomas E. McGuire, Agent of the Federal Bureau of Narcotics (Tr. 109-121), testifying for the Government, corroborated the other witness' testimony concerning the activities of the defendants on August 9th at Scambellone's saloon, with the additional testimony that, on that morning, he saw Maugeri enter Scambellone's residence at 1644 Grant Avenue and saw Tocco and Barri enter there about 9:00 o'clock in the evening and remain about ten minutes. They did not have the luggage with them when they left.

He further testified that on Sunday, August 13th, he observed a Chevrolet automobile enter Maugeri's driveway between 9:15 and 9:30 in the morning. He corroborated the testimony concerning finding the boxes, wrapping paper and tape in the cabin. He initialed the cartons and kept custody of all of this evi-

dence until he delivered them to the custodian in the office of the Federal Bureau of Narcotics.

Vance Newman, Agent of the Federal Bureau of Narcotics (Tr. 121-151), testifying for the Government, corroborated the other witnesses' testimony concerning the general surveillance of the defendants and testified that he saw two or more of them together and with Pocoroba on many occasions. He also corroborated the other witnesses' testimony concerning the trip to San Francisco and the moving of luggage from Maugeri's car to Scambellone's home.

He further testified that on Sunday, August 13, 1944, he saw Pocoroba, and in the company of other agents had a conference with the District Supervisor of the Bureau of Narcotics, Mr. Manning. He and the other agents went to the Oakland Mole and made a search of trains. They returned to Santa Cruz and went to Pocoroba's cabin. He initialed the cartons found there.

He left by plane from San Francisco on Monday, August 14, 1944, at 6:00 P. M. for Chicago. The witness testified:

“On the morning of August 16th I went to the Chicago-Northwestern Railroad Station at Chicago accompanied by Agent Walsh, from the office of the Bureau of Narcotics. We went there about seven o'clock in the morning. We watched the incoming trains and observed the people coming in, or getting off those trains. Those trains were coming from the West. I saw Tocco on that morning. He arrived on train No. 28, which was

due in at 8:30, but it did not get in until 9:15 a. m. It came in in two sections. I saw him get off the second section of that train. That train came from San Francisco. I saw Tocco leave the second section of that train and carrying a blue cloth bag, that is Exhibit 2, and I followed him. He walked down to the main level of the station. He stood there at the place where the baggage is delivered, and about fifteen minutes later the baggage trucks were pushed up. He claimed the large yellow suitcase, which is Government's Exhibit No. 1, and when he had both pieces of luggage he called for a cab, and then Agent Walsh and I placed him under arrest. When we placed him under arrest we took possession (106) of those two pieces of luggage, the cloth overnight bag and the tan suitcase. We went to the Chicago office of the Federal Bureau of Narcotics. I got the keys to open the suitcase from Tocco, I opened the blue bag right there in the station. It was locked. Tocco gave me the key" (Tr. 126-127).

The witness further testified:

"I opened the small bag in the station. It was there by some freight elevators. I led him away from the place where the crowd was to a place about fifteen or twenty yards from there, in front of some elevators on the ground floor of the station. In the bag I found some cans of opium. They were wrapped in brown paper and sealed with brown paper tape. There were about twenty cans in the small blue overnight bag. I opened the tan suitcase when I got to the office of the Bureau of Narcotics. I found 75 cans of opium and found a package of opium weighing a little

over eight ounces, and I found eight ounces of morphine in a sugar box in the tan suitcase” (Tr. 128).

He brought the opium back to San Francisco and delivered it to Mr. Mallory, a Government chemist. It was the opium which was offered in evidence.

George E. Mallory (Tr. 151-154), testifying for the Government, testified that he is a chemist employed by the United States Treasury Department, that he examined Government’s Exhibits 8 and 9 for Identification and made an analysis of their contents and found it to be opium. He further stated that the two cardboard cartons, Government’s Exhibits 3 and 4 in evidence, contained smoking opium “sticking all over the box” (Tr. 152).

Government’s Exhibits 1, 2, 8 and 9 for Identification were received in evidence.

Salvatore Maugeri (Tr. 158-188) testifying in his own behalf, testified that he was convicted of counterfeiting in 1935 and served two years in a federal penitentiary: that of the automobiles mentioned in the case, the Oldsmobile belonged to his son, the Chevrolet belonged to his nephew, the Pontiac also belonged to his son. He testified that he met and became friendly with a man named Lagaipa who introduced him to Tocco, that Tocco lived at his house for a couple of weeks, that he did not charge him any rent. He left and came back in July and stayed at Maugeri’s home for about a month. He met Barri through Tocco, and Barri also lived at his home. He became quite friendly

with them. On one occasion he drove them to San Francisco with some grips. He took them to Scambellone's bar and they asked if they could leave their grips there until they got reservations to go East.

He admitted knowing Pocoroba under the name of Benny Vicari. They became quite friendly. Pocoroba talked about narcotics but he did not pay any attention because he didn't like it (Tr. 167). He denied knowing that Tocco, Barri and Lagaipa had anything to do with narcotics. He read a letter which Pocoroba received from Chicago a couple of times but didn't pay any attention to it. They talked about narcotics once in a while but he never discussed it because he had nothing to do with it. After his trip to San Francisco with Tocco and Barri, Tocco phoned him and asked if he had seen Barri, that "he was worrying about what happened to him" (Tr. 169). He told Pocoroba about this call and told him if he saw Barri to let Tocco know. He admitted being in Pocoroba's cabin on Saturday night, August 12, 1944, at about 11:00 or 11:30 o'clock but denied having any conversation about narcotics. He claimed he went there for a drink. When he arrived he saw Tocco and Barri outside the cabin and they had "some kind of box" (Tr. 171), but that he didn't pay any attention to it. They all went inside, he stayed about ten minutes and then went back to work at the concession. He left there at about a quarter to two o'clock, went home and to bed and did not arise until about 7:00 or 7:30 Sunday morning. He went back to the concession and at about 9:00 o'clock returned to his home in a Chevrolet

car. He denied going to Pocoroba's cabin at 3:00 or 3:30 o'clock Sunday morning and stated that when he left there Saturday evening he said "Maybe I see you boys tomorrow" (Tr. 174). On Wednesday just prior to his arrest he had a conversation with Pocoroba about ten cans of dope and in answer to Pocoroba's request to get it for him, stated "I don't need no help, I got no dope." "I haven't got it" (Tr. 174).

On cross-examination he stated that when he went to the cabin on Saturday night he went in before the boxes were brought in, that both Tocco and Barri carried a box, that he did not ask what was in them and didn't pay much attention. He denied having any conversation with Pocoroba or Tocco then and stated that neither Tocco nor Barri told him they were leaving in the morning.

He stated that Tocco had been in Santa Cruz on two occasions before this, in November, 1943, and March or April of 1944. Both times he stayed at appellant's home. The second time he did not charge him rent—"He was a friend" (Tr. 177). On this last occasion Tocco came to his home in July; he again did not charge him rent. Tocco told him he was in the wholesale fish business in the East. He was introduced to Barri by Tocco. Tocco's baggage resembled that which was in evidence.

On the way to San Francisco Tocco and Barri asked him if he knew someone who would keep their suitcases while they made reservations. He asked Scambellone.

He stated he asked Pocoroba if Tocco and Barri could stay in his cabin after their trip from San Francisco because he did not have room as some friends were staying over the week-end. He didn't remember whether Barri returned on Thursday night and Tocco on Friday night (Tr. 181).

QUESTIONS.

1. *Do Counts One and Two of the indictment state but one offense or do they recite separate and distinct offenses punishable as such?*

2. *Is the evidence sufficient to support the verdict?*

3. *Will the Appellate Court consider the sufficiency of the evidence when a motion for a directed verdict, made at the close of the plaintiff's case, and overruled, is not renewed at the close of the entire case?*

ARGUMENT.

1. COUNTS ONE AND TWO OF THE INDICTMENT STATE SEPARATE AND DISTINCT OFFENSES PUNISHABLE AS SUCH.

This point was definitely settled by this Honorable Court in the case of

Gargano v. United States (CCA-9, 1944), 140 F. (2d) 118.

In that case, as in this, the defendant was charged in one count with concealing and facilitating the conceal-

ment of narcotics, and in the second count with facilitating the transportation of the same narcotics. In that case, as in this, the two offenses arose out of the same transaction and occurred on different dates. The Court held that the indictment, based on the Jones-Miller Act (21 U.S.C. 174), stated two separate and distinct offenses punishable as such. The *Gargano* case is on "all fours" with the instant case.

In so deciding the Court followed the well-established rule laid down in

Parmagini v. United States (CCA-9), 42 F. (2d) 721, 724, 725, certiorari denied, 283 U. S. 818,

which held that the concealment and sale of narcotics under the Jones-Miller Act (21 U.S.C. 174) are distinct offenses although both occur in connection with a single transaction.

This rule was reiterated in

Palermo v. United States (CCA-1), 112 F. (2d) 922

where it was held, under the same Statute, that importing and bringing in of narcotics and the concealment of the same are distinct violations.

The same Court in

Silverman v. United States, 59 F. (2d) 636, certiorari denied, 287 U. S. 640

held that sale and concealment of narcotics are separate and distinct offenses and specifically held that conviction on counts charging sale and concealment separately, does not constitute double jeopardy.

Although the offenses charged in Counts One and Two related to and grew out of one transaction, nevertheless two offenses are defined by statute and the proof in Count Two is different from that in Count One.

The above rule is restated in *Hunt v. Hudspeth*, (CCA-10), 111 F. (2d) 42, at page 44, as follows:

“Congress may make separate steps in a single transaction distinct and separate offenses. *Burton v. United States*, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Casebeer v. United States*, 10 Cir. 87 F. (2d) 668; *Slade v. United States*, 10 Cir. 85 F. (2d) 786.

“The test as to whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge. If not, then the fact that both charges relate to and grow out of one transaction does not make only a single offense where two distinct offenses are defined by the statute.”

See also,

Walsh v. White (CCA-8), 32 F. (2d) 240, where it was held that the offenses of purchase, possession and sale of the same quantity of morphine are separate and subject to separate penalties.

See also

Yep v. United States (CCA-10), 81 F. (2d) 637, reversed on other grounds, 83 F. (2d) 42.

2. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE
VERDICT AND JUDGMENT.

We cannot believe that appellant seriously contends that the evidence in this case is insufficient to support the verdict. If Agent Pocoroba's testimony, corroborated as to numerous physical facts by the testimony of other Federal Narcotic Agents and Customs Agents, was believed, there can be no doubt that the evidence was more than sufficient to support the verdict.

When the appellant delivered the two cartons of opium to the defendants Tocco and Barri in Agent Pocoroba's cabin he had committed the offense of concealing and facilitating the concealment of opium. When in addition to this, on the following morning, he drove the defendant Tocco in his automobile, presumably to board the train taking him to Chicago, he committed the separate offense of facilitating the transportation of opium. It is to be remembered also that the appellant admitted to Pocoroba that he drove Tocco to Berkeley and that his car was seen entering his home at 9:00 A. M. Sunday morning.

Following the reasoning of this Honorable Court in
Pon Wing v. United States (CCA-9), 111 F.
(2d) 751, 758,

the appellant certainly made the transportation of the narcotics "less difficult". In that case the Court said:

"Anything done to make the continuance of the trip 'less difficult' would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning, the

framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

The fact that the appellant might also have been guilty of transporting the opium under the Harrison Narcotic Act (26 U.S.C. 2553 and 2557) is immaterial. He was not so charged and we are concerned here only with the fact that he facilitated its transportation.

In *United States v. Cohen* (CCA-2), 124 F. (2d) 164, certiorari denied, 315 U.S. 881, Rehearing denied 316 U.S. 707, the Court held that in a prosecution of four defendants for concealing and facilitating the transportation of morphine it was not necessary that each of the defendants have the narcotics but only that one or more of them had possession while the other aided in the illicit transaction to which the possession was incidental.

3. THE APPELLATE COURT WILL NOT CONSIDER THE SUFFICIENCY OF THE EVIDENCE WHEN A MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE PLAINTIFF'S CASE AND OVERRULED IS NOT RENEWED AT THE CLOSE OF THE ENTIRE CASE.

Under federal practice an Appellate Court will not consider the sufficiency of the evidence in the absence of a request for an instructed verdict.

Kennedy Lumber Company v. Brickbory, 40 F. (2d) 228;

Hansen v. Boyd, 161 U. S. 397.

Error, if any, in overruling a motion to direct a verdict at the close of ^{plaintiff's} defendant's case is not reviewable where the motion was not renewed at the close.

U. S. v. Salmon, 42 F. (2d) 353;

Wilson v. Haley Livestock Co., 153 U. S. 39.

The introduction of evidence by the accused in his own behalf is a waiver of previous motions for an instructed verdict.

Simpson v. United States (CCA-8 1911), 184 Fed. 817;

Stearns v. United States (CCA-8, 1907), 152 Fed. 900;

Burton v. United States (CCA-8, 1907), 142 Fed. 57.

This ruling applies to criminal as well as civil cases.

Leyer v. United States (CCA-2, 1910), 183 Fed. 102.

The record shows that a Motion for a Directed Verdict was not made by appellant at the close of appellant's case.

CONCLUSION.

For the reasons stated we respectfully submit that the decision of the lower Court should be affirmed.

Dated, San Francisco,

June 25, 1945.

Respectfully submitted,

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